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IN THE

Supreme Court of the United States

October Term 1953

No. [redacted]-78 1

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of Ralph R. Huesman, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Photograph of property involved.....Frontispiece

Petition for Writ of Certiorari to the Supreme Supreme Court of the State of California..... 1

A.

Summary statement of the case..... 2

B.

Statements disclosing basis of jurisdiction..... 10

C.

Questions presented 11

D.

Reasons relied on for allowance of writ..... 13

Brief in Support of Petition for Writ of Certiorari..... 17

I.

Opinions below 17

Supreme Court of California..... 17

The District Court of Appeal of California..... 17

II.

Jurisdiction 18

III.

Statement of the case..... 18

IV.

Specifications of errors..... 18

PAGE

V.

Argument 19

Summary of argument 19

Point 1. By limiting unreasonably the use of petitioners' property, respondent City's zoning ordinance deprives petitioners of a substantial right therein without compensation in violation of the due process clause of the Fourteenth Amendment 20

Point 2. Section 10 of said ordinance cannot be justified under the police power 24

A. Public safety of residences constructed on pilings on petitioners' property 25

B. Construction of residences on pilings on petitioners' property would not affect public morals 29

C. The police power is subordinate to constitutional limitations 31

Point 3. The evidence shows that the motives of respondent City in enacting said zoning ordinance were wrongful. The holding of the Supreme Court of California that such motives were immaterial is erroneous and conflicts with the rulings of this court 32

Conclusion 37

Appendix A. Section 10 of Zoning Ordinance No. 502 of respondent City of Manhattan Beach ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587	13, 14, 23
Chicago, Burlington & Quincy Ry. v. Drainage Commissioner, 200 U. S. 561	31
City of Manhattan Beach v. Cortelyou, 10 Cal. 2d 653, 76 P. 2d 483	3, 20, 32
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	30
Cusack Co. v. City of Chicago, 242 U. S. 526	19
Dobbins v. Los Angeles, 195 U. S. 223	11, 14, 30, 35, 37
Eaton v. Sweeny, 257 N. Y. 176, 177 N. E. 412	13, 23
Eubank v. Richmond, 226 U. S. 137	31
Grand River Dam Authority v. Grand-Hydro, 335 U. S. 368	14, 35
Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N. E. 2d 195	14, 35
Householder v. Town of Grand Island, 114 N. Y. S. 2d 852	13, 23
Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10	35
McCarthy v. City of Manhattan Beach, 257 P. 2d 679	8, 9, 10, 34, 35
Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613	13, 23, 31
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	11, 13, 23, 37
Scholl v. Borough of Yeadon, 148 Pa. Super. 601, 26 A. 2d 135	13, 23
Seattle Trust Co. v. Roberge, 278 U. S. 116	11, 13, 23
State v. Cincinnati Gas-Light & Coke Co., 18 Ohio St. 262	14, 35, 36
State ex rel. Tingley v. Gurda, 209 Wis. 63, 243 N. W. 317	35
Truax v. Corrigan, 257 U. S. 312	11, 25
Yick Wo v. Hopkins, 118 U. S. 356	11, 36
Zang & Sons Builders, Inc. v. Taylor, 102 A. 2d 723	22

STATUTES PAGE

Deering's California General Laws, Act 5211b..... 10
Manhattan Beach City Ordinance No. 502, Sec. 10.....
.....4, 5, 6, 10, 11, 12, 14, 18
19, 23, 24, 29, 30, 31, 32, 37
Planning Act (Stats. 1929, Chap. 838)..... 10
United States Code, Title 28, Sec. 1257..... 10
United States Constitution, Fourteenth Amendment.....
.....18, 19, 24, 29, 30, 32
United States Constitution, Fourteenth Amendment, Sec. 1..... 10

TEXTBOOK

7 MacQuillan, Municipal Corporations (3rd Ed.), p. 490, par. 24.505 21

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No. .....

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of Ralph R. Huesman, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners above named respectfully petition for writ of certiorari to review a decision of the Supreme Court of California (41 Cal. 2d 879, 264 P. 2d 932) [R. 367] rendered December 30, 1953. A timely petition for rehearing was denied January 27, 1954 [R. 387]. Said decision holds valid a zoning ordinance of respondent City restricting petitioners' property (see frontispiece) to playground purposes and prohibiting all structures except lifeguard towers, open smooth wire fences and small signs.

A.
Summary Statement of the Case.

Petitioners own approximately three-fifths of a mile of ocean beach frontage in the respondent City of Manhattan Beach. The parcel varies in width from 174 feet to 184 feet and borders the Pacific Ocean on the west. It lies between lines 1 and 2 on the aerial photographs reproduced in the frontispiece [based on Pltfs. Exs. 1 and 2]. The structure crossing petitioners' property is a municipal pier erected by respondent City on an easement granted for street purposes by petitioners' predecessor in interest [Ex. 10].

On the north, petitioners' property is bordered by public ocean beach. In 1925 said property was subdivided into residential lots and the map of said subdivision was approved by respondent's City Council [Ex. 5]. Prior to the adoption of the challenged zoning ordinance, said property was acquired by the State and has since been used as a state park [R. 258; Ex. 3].

On the south, petitioners' property is bordered by public ocean beach acquired and owned by the adjoining City of Hermosa Beach [Exs. 3 and 12]. Privately owned beach property beginning at approximately 130 feet south of the south line of petitioners' property has been used and improved for residential purposes for more than thirty years [R. 151; Exs. 1, 2 and 18]. These houses are clearly visible on the two photographs reproduced in the frontispiece.

On the east, petitioners' property is bordered by a strip of land 50 feet wide which was used as an electric railway right of way until 1941 [Fdg. II, R. 37]. Thereafter said strip was acquired by the State and has since been

used as a state park [Par. VI, Comp., R. 12; Par. V of Answer, R. 31; Ex. 3]. Eleven dedicated and accepted public streets (ten unimproved) cross said strip of land. Ten of said streets terminate at the east line of petitioners' property [Exs. 4, 6, 7, 9, 10 and 11]. Immediately east of said electric railway right of way is a public walkway known as The Strand adjoining which is private property which has been zoned and used for commercial and residential purposes long prior to the adoption of the challenged zoning ordinance [R. 236-237, 306; Ex. 3].

From 1923 until the passage of the challenged zoning ordinance in 1941 petitioners' property was zoned for residential purposes [Exs. 14 and 15].

In 1924 the respondent City, claiming to own the property in question, instituted an action in the state courts for the purpose of quieting title in respondent City. The contention of the City in said action was that the property had been dedicated for public use. In February, 1938, the Supreme Court of California held that the City's claim was without merit (*City of Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653, 76 P. 2d 483).

Shortly after the decision in the *Cortelyou* case and on numerous occasions prior to the adoption of the zoning ordinance in question, respondent, through the City Council and its other officials, requested the County of Los Angeles and the State of California to acquire petitioners' property for park purposes by purchase or eminent domain proceedings while the property remained unimproved.[1] Respondent City was unsuccessful in its efforts

[1]Exs. 20, 21, 23, 25, 26, 29, 39 and 40.

to induce the County of Los Angeles or the State of California to obtain petitioners' property for public use.

In July, 1940, petitioners attempted to enclose their property with a smooth wire fence. The public destroyed the fence before it was completed [R. 131; Ex. 36]. On July 30, 1940, Mr. McCarthy informed the City Council by letter of such destruction and demanded respondent City protect petitioners' property [Ex. 37]. The fence was so damaged by the public that it was necessary to remove it entirely from the premises [R. 322].

In 1940 and 1941 respondent's Planning Commission, assisted by a zoning expert of the County of Los Angeles prepared the zoning ordinance in question [R. 250-251, 303]. On June 26, 1941, neither the County nor the State having come to respondent City's aid, the City Council adopted the challenged Ordinance No. 502 [Ex. 1 to Comp., R. 20A-20C].

For eighteen years immediately prior to the adoption of the ordinance here under attack, petitioners' property had been zoned for residence purposes. Despite this fact the challenged ordinance rezoned petitioners' property and limited its use to beach recreation purposes. Petitioners' property was the only privately owned parcel of *ocean frontage* in respondent City that was so zoned. The electric railway right of way, heretofore mentioned, was the only other parcel of privately owned land within the city limits included within the beach recreation zone [map, a part of Ex. 1 to Complaint (see original certified record)].

Section 10 of said ordinance (printed in the Appendix hereto) states the uses to which petitioners' property may

be put and the improvements that may be constructed thereon. The only uses permitted are:

> (a) "beach recreation activities" (swimming, surf fishing and athletics) for which an admission fee may be charged, and
>
> (b) the rental of certain beach equipment (back rests, umbrellas, kayaks, canoes, small boats, etc.)

The only structures that may be erected thereon are smooth wire fences, lifeguard towers and small signs. Restrooms, dressing rooms, refreshment stands, parking lots, or buildings for storage of equipment (that may be rented) are not permitted [Ordinance No. 502, Sec. 10; Appendix, p. 1].

In 1948 the State, exercising the right of eminent domain, commenced proceedings to condemn petitioners' property for public park purposes. Said action is at issue but has not been set for trial [41 Cal. 2d 879, 884; R. 369].

In 1950 petitioners applied to the Planning Commission of respondent City to change the zoning of petitioners' property from the limited Beach Recreation purposes to residence purposes. In said application petitioners challenged the validity of said ordinance claiming that it

> "is unreasonable, arbitrary and discriminatory and not reasonably necessary for the health, safety, morals or general welfare of the community, and in fact acts as a taking or damaging of said private property without compensation and without due process of law" [Alleged, Comp., R. 15; not denied, Ans., R. 32].

The Planning Commission denied said application [Ex. 49] and the City Council likewise denied said appli-

cation [Resolution No. 1551, Ex. 3 to the Comp.; R. 21-28; Fdg. VI, R. 38].

On May 21, 1951, petitioners filed this action in the State courts for declaratory relief, alleging two causes of action [R. 7-28]. The first challenged the constitutionality of Section 10 of the zoning ordinance as depriving petitioners of their property without due process of law and denying to them the equal protection of the laws under both the Federal and State Constitutions. The second challenged the validity of said ordinance on the further ground that the respondent City, the mayor and the members of its legislative body had conceived a scheme or plan of action designed and intended to keep petitioners' property unimproved so that it could be used by the public for park purposes and to depreciate the value of petitioners' property in order that it could be acquired for park purposes in eminent domain proceedings at the lowest possible price (see Br., Point 3, *post*, p. 32).

Respondent filed an answer to the first cause of action [R. 29-33] and later a separate answer to the second cause of action [R. 33-35]. In the answers the enactment of the zoning ordinance and the adoption of the resolution were admitted, but generally the other material allegations of each cause of action were denied.

The case was tried to the court without a jury. The uncontradicted evidence showed the facts as we have recited them above. Although the zoning ordinance prohibits the construction of any houses on petitioners' prop-

erty, the uncontradicted evidence showed that the Building Code of respondent City requires that houses built on petitioners' property must be constructed on pilings [R. 271-273]. The trial court held that the zoning ordinance was constitutional because:

> (a) residences if constructed on petitioners' property would have to be erected on pilings and that reasonable minds might differ as to the safety of residences so constructed [Fdg. II, R. 37]; and
>
> (b) the construction of such houses on pilings might create police problems by reason of the possible use of the area underneath thereof for immoral purposes [Fdg. II, R. 37].

For eighteen years prior to the adoption of the challenged ordinance, petitioners' property was zoned for residence purposes. No change of conditions upon petitioners' property nor in adjacent areas was shown to have occurred during this eighteen-year period or after the adoption of said zoning ordinance up to the time of trial that made petitioners' property unsuited for residential purposes and suited only for beach recreational purposes. On the contrary, the uncontradicted evidence showed that from 1935 to 1946 due to the addition of some forty to fifty-seven feet of accretions [R. 212, 214, 215] to petitioners' property it became better adapted to residential use. The trial court found "that reasonable minds might reasonably differ" as to whether or not petitioners' property was suitable for either residential or commercial development [Fdg. IX, R. 39].

From the time of the enactment of the ordinance in 1941, denying petitioners the right to use their property for residence purposes, the city and county ad valorem tax on the property was increased from $4,264.00 in 1941 to $8,947.00 in 1950 [Ex. 50]. However, during this period when the petitioners paid $50,137.00 in city and county taxes [Ex. 50] they obtained no revenue from the property [R. 310].

The trial court concluded [R. 40] and adjudged [R. 43] that the challenged ordinance did not deprive petitioners of their property without due process of law.

The trial court during the course of the trial expressly stated that the motive of the City in adopting Ordinance No. 502 was immaterial [R. 118, 123-125] nevertheless the Court made findings that the motives were not wrongful [Fdg. VII, R. 38-39; Fdg. XII, R. 40].

Petitioners' appeal to the Supreme Court of California was transferred to the State District Court of Appeal which unanimously reversed the judgment (*McCarthy v. City of Manhattan Beach*, 257 P. 2d 679) [R. 346], holding that Section 10 of said ordinance

> "* * * is confiscatory and constitutes a taking of plaintiffs' property for public use without compensation and without due process of law. * * * said section * * * is unconstitutional and invalid." (257 P. 2d 690.) [R. 365.]

Upon petition for rehearing, the District Court of Appeal unanimously denied the petition [R. 365].

The Supreme Court of California subsequently granted a hearing and by a divided court affirmed the judgment of the trial court (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879) [R. 367]. The Chief Justice did not participate. Three justices joining in one opinion stated that said Section 10 of the zoning ordinance was "a fair, just and reasonable regulation for the general welfare of the city" [R. 382]. In said three justices' opinion it was held that the trial court properly disregarded petitioners' contention that said zoning ordinance was not adopted in good faith.[2] One justice wrote a separate opinion, concurring in the judgment [R. 382]. Two justices dissented and adopted the opinion of the District Court of Appeal [R. 385]. Indeed, one of the dissenting justices of the State Supreme Court stated:

> "Taking the property as is here done does not appear to me to be encompassed within a reasonable exercise of the police power * * *; *it smacks more of calculated and arbitrary confiscation by a police state.* Besides all that, I should like to think that the scheme here resorted to was beneath the honor of a self-respecting American municipality." (41 Cal. 2d 879, 900.) [R. 387.]

Petitioners' petition for rehearing in the State Supreme Court was denied, two justices dissenting [R. 387].

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[2]*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 893 [R. 379].

B.

Statements Disclosing Basis of Jurisdiction.

1. Jurisdiction of this court is invoked under Section 1257 of Title 28, United States Code. The judgment or decree sought to be reviewed is a final judgment of the Supreme Court of the State of California which is the highest court in this state in which a decision in said case could be had.

2. The statute of the state, the validity of which is involved, is Section 10 of Ordinance No. 502 of respondent City [Ex. 1 to Comp.; R. 20A-20C; Appendix, p. 1] purportedly adopted pursuant to The Planning Act [Calif. Stat. 1929, Chap. 838, and acts amendatory thereof and supplementary thereto in effect on June 26, 1941; Deering's California Gen. Laws, Act. 5211b].

3. The decision of the Supreme Court of California was filed on December 30, 1953 [R. 367]; petition for rehearing, timely filed, was denied January 27, 1954 [R. 387]. Mr. Justice Douglas, pursuant to application of petitioners, extended the time of petitioners to file a petition for writ of certiorari herein to and including May 27, 1954 [R. 393].

4. The nature of the case has been stated (*ante,* pp. 2 to 9). Petitioners in their complaint challenged the validity of Section 10 of said zoning ordinance on the ground that it deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment [R. 16], and denied to petitioners the equal protection of the laws in violation and contravention of Section 1 of the Fourteenth Amendment [R. 17]. These constitutional guarantees were asserted and urged in the trial court and at all stages of the appeal in the appellate courts of California (*McCarthy v. City of*

Manhattan Beach, 41 Cal. 2d 879, 882 [R. 367]). The trial court and the Supreme Court of California held these constitutional guarantees did not protect petitioners [R. 382].

5. The following cases are believed to sustain jurisdiction:

Yick Wo v. Hopkins, 118 U. S. 356;

Dobbins v. Los Angeles, 195 U. S. 223;

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393;

Seattle Trust Co. v. Roberge, 278 U. S. 116.

C.
Questions Presented.

Broadly stated the questions presented are:

Did said Section 10 of respondent's zoning ordinance deprive petitioners of their property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States?

Does said Section 10 deny to petitioners the equal protection of the laws?

Stated more specifically:

1. Did said Section 10 by limiting the use of petitioners' property:

(a) to beach recreational purposes; and

(b) to the erection thereon of fences, small signs and lifeguard towers;

amount to a taking of said property for public use without compensation?

2. Is there "substantial support"[3] in the evidence for the determination of the courts below that said Section

[3] *Truax v. Corrigan,* 257 U. S. 312, 324.

10 has such relationship to public health, public morals, public safety and general welfare as to be a proper exercise of the police power?

3. Does respondent's zoning ordinance by restricting the use of petitioners' property to playground purposes, while permitting stores, single and multiple family residences or other useful structures to be erected on all other privately owned land in respondent City, deny to petitioners the equal protection of the laws?

4. Are petitioners further denied the equal protection of the laws by the determination of the courts below that said Section 10 is a legitimate exercise of the police power because if the construction of residences on pilings on petitioners' property was permitted, the area underneath such residences might possibly be used for immoral purposes, although such ordinance permits structures, equally available for immoral purposes, in all other portions of said City?

5. Where there was uncontradicted documentary evidence that the motives of respondent City in enacting said Section 10 were:

(a) to depress the value of petitioners' property so that eventually it could be acquired for recreational purposes at such depressed value in condemnation proceedings; and

(b) to limit the use of the property to public recreational purposes (knowing that petitioners could not effectively enclose it) during the interval between adoption of the ordinance and acquisition in condemnation proceedings;

were the courts below correct in ruling that such motives must be disregarded regardless of the indicia of fraud shown?

D.

Reasons Relied on for Allowance of Writ.

1. The Supreme Court of California has decided a federal question of substance not heretofore determined by this court, namely, that a city, under the guise of the police power, may limit the use of private property by zoning ordinance to only playground purposes and prohibit the erection of any structures thereon other than fences, lifeguard towers and small signs.

2. The Supreme Court of California has decided a federal question of substance in a way probably not in accord with applicable decisions of this court and of the courts of other states.[4]

3. The Supreme Court of California has held valid as a proper exercise of the police power a municipal zoning ordinance which, so far as we have discovered, is more restrictive as to use and structures than any other ordinance heretofore upheld by any court. It did so upon findings without substantial support.

4. Under any view of the evidence, the Supreme Court of California has held valid a zoning ordinance which clearly went beyond the necessities of the case.

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[4]*Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393; *Panhandle Eastern Pipeline Co. v. State Highway Commission,* 294 U. S. 613, 621; *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121; *Eaton v. Sweeny,* 257 N. Y. 176, 177 N. E. 412, 414; *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 232, 15 N. E. 2d 587, 591; *Householder v. Town of Grand Island,* 114 N. Y. S. 2d 852, 855; *Scholl v. Borough of Yeadon,* 148 P. Super. 601, 26 A. 2d 135, 137.

5. The decision of the Supreme Court of California that the motives of a municipality in enacting an ordinance are immaterial, conflict with the conclusions reached by this court and with the decisions of the highest courts of other states.[5]

If a city may validly zone private property for the limited use and improvement provided by Section 10 of the zoning ordinance in question, all unimproved property bordering a body of water and adaptable for recreation purposes may be so restricted. Certainly this will be the rule in California unless corrected by this court. Moreover, it will tend to become a precedent throughout the United States. Such a restriction goes beyond an *actual taking* in that it

> "* * * leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."
>
> Lehman, J., in *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 232, 15 N. E. 2d 587, 592.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court directed to the Supreme Court of California to the end that this cause may be reviewed and determined by this court as provided by the Statutes of the United States, that the

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[5]*Dobbins v. City of Los Angeles,* 195 U. S. 223, 240; *cf. Grand River Dam Authority v. Grand-Hydro,* 335 U. S. 368, 369; *State v. Cincinnati Gas-Light Co.,* 18 Ohio St. 262, 301-302; *Grand Trunk Western R. Co. v. City of Detroit,* 326 Mich. 387, 40 N. E. 2d 195.

judgment or decree herein of said Supreme Court of California be reversed by this court, and for such other and further relief as to this court may seem proper.

Dated: May 13, 1954.

Respectfully submitted,

T. B. COSGROVE,
JOHN N. CRAMER,
LEONARD A. DIETHER,
Counsel for Petitioners.

J. D. BARNUM, JR.,
Of Counsel.

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Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation.

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

SUPREME COURT OF CALIFORNIA:

The opinions of the four justices of the Supreme Court of California joining in an affirmance of the judgment of the trial court are reported in 41 Cal. 2d 879, 882, 896, 264 P. 2d 932, 933, 941 [R. 367, 382]. The dissenting opinions are reported in 41 Cal. 2d 879, 898, 900, 264 P. 2d 932, 943, 944 [R. 385].

THE DISTRICT COURT OF APPEAL OF CALIFORNIA:

The unanimous opinion reversing the judgment of the trial court is reported in 257 P. 2d 679 [R. 346].

II.
JURISDICTION.

The basis of jurisdiction is given under heading "B" in Petition for Writ of Certiorari (*ante,* p. 10) and in interest of brevity is incorporated here by reference.

III.
STATEMENT OF THE CASE.

A Summary Statement of the Case appears under heading "A" in the Petition for Writ of Certiorari (*ante,* pp. 2 to 9) and in the interest of brevity is incorporated here by reference. Said statement is amplified in the Argument (*post,* pp. 25-26, 28-30, 32-35).

IV.
SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In holding that Section 10 of respondent's zoning ordinance does not effect a taking of petitioners' property for public use without compensation and therefore does not violate the due process clause of the Fourteenth Amendment to the Constitution.

2. In holding that said Section 10 does not violate the due process clause of the Fourteenth Amendment of the Constitution because it has such relationship to public health, public morals, public safety and the general welfare as to be a proper exercise of the police power.

3. In holding that the restriction of petitioners' property to uses for playground purposes (not applicable to any other privately owned property in the city) does not deny to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

4. In extending the nuisance rule applicable to billboards, announced in *Cusack Co. v. City of Chicago*, 242 U. S. 526, to petitioners' property as justification for the ordinance prohibiting the construction of residences.

5. In holding that evidence of the motives of respondent City in enacting Section 10 were properly disregarded by the trial court although the motives were in furtherance of a plan or scheme designed and intended to depress the value of petitioners' property and thereafter to obtain said property at such depressed value in eminent domain proceedings and to limit the use of the property to public recreational purposes during the interval between the adoption of the ordinance and its acquisition in condemnation proceedings.

6. In holding that said Section 10 was a reasonable regulation for the general welfare of respondent City.

V.

ARGUMENT.

Summary of Argument.

Point 1. By limiting unreasonably the use of petitioners' property, respondent City's zoning ordinance deprives petitioners of a substantial right therein without compensation in violation of the due process clause of the Fourteenth Amendment.

Point 2. Section 10 of said ordinance cannot be justified under the police power.

Point 3. Uncontradicted documentary evidence shows that the motives of respondent City in enacting said zoning ordinance was wrongful. The holding of the Supreme Court of California that such motives were immaterial conflicts with the rulings of this court.

POINT 1.

By Limiting Unreasonably the Use of Petitioners' Property, Respondent City's Zoning Ordinance Deprives Petitioners of a Substantial Right Therein Without Compensation in Violation of the Due Process Clause of the Fourteenth Amendment.

As pointed out in the Summary Statement of the Case, petitioners' property was zoned for residential purposes for a period of eighteen years immediately prior to the adoption of said zoning ordinance in 1941 [Exs. 14 and 15]. The trial court found that reasonable minds might differ as to whether petitioners' property is or was suitable for residential development [Fdg. IX, R. 39]. There was no evidence that at the time of the adoption of the ordinance or at any time subsequent thereto petitioners' property was not suited or adapted for residential purposes; further, the trial court rejected petitioners' offer to prove that it could be so developed [R. 238].

Respondent City, by a quiet title action, clouded the title to the property in question from 1925 to 1938 [*Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653, 76 P. 2d 483; Ex. 6]. When the City's claim was adjudged to be without merit, it sought the aid of the County and the State to acquire petitioners' property for public purposes while the property was still unimproved in order that the public could use the same as a public beach [Exs. 20, 21, 23, 25, 26, 29, 39, 40]. When the City's efforts to acquire the property through the County and State authorities failed, the City adopted said zoning ordinance restricting the use of petitioners' property to playground purposes [Ex. 1 to Comp.; R. 20A-20C]. Petitioners' property and the former electric railway right of way were the only parcels of private property included in the

beach recreation district or zone [Ex. 1 to Comp. (see original certified record)]. At that time there was a public beach on the north and south of petitioners' property [R. 258; Ex. 12]. Said former right of way contiguous to petitioners' property on the east has been acquired since by the state for park purposes [Par. VI, Comp., R. 12; and Par. V, Ans., R. 31].

The limitation placed on the use of petitioners' property deprives it of any reasonable or profitable use. The respondent's City Council adopted the ordinance which authorized petitioners to charge admission to their property [Sec. 10, Ex. 1 to Comp., R. 20B, Appendix p. 1], knowing petitioners had been unable to maintain a fence around it [R. 131; Ex. 37]. It also authorized petitioners to rent certain beach equipment but denied to petitioners the right to construct thereon any improvements which would enable them to take advantage of the very limited use permitted [Sec. 10, Ex. 1 to Comp., R. 20B; quoted Appendix, *post,* p. 1]. The fact that petitioners are prohibited from constructing restrooms, dressing rooms or any buildings in which to exhibit or store equipment to be rented, together with the adidtional facts that petitioners are denied the privilege of maintaining a parking lot for automobiles or any structure for the sale of food or soft drinks, in and of itself makes said Section 10 arbitrary and oppressive, aside from other grounds of invalidity.

In 7 MacQuillan on Municipal Corporations, 3rd Ed. 490, par. 24.505, the author says:

> "Prohibition of buildings as distinguished from their regulation cannot be ordained by the state or a municipal corporation unless the prohibited building

is *per se* dangerous to public health and safety * * *."

There is no evidence in the record that buildings if constructed on petitioners' property would be *per se* dangerous to public health and safety.

Petitioners' property was zoned for residential purposes from 1923 to 1941 [Exs. 14 and 15]. There was no showing that during said period or subsequently there was any change in the character of petitioners' property or of the neighborhood surrounding petitioners' property, nor was there any evidence of error or mistake in the original zoning for residential purposes. (See *Zang & Sons Builders, Inc. v. Taylor* (Md.), 102 A. 2d 723, 726, 727.)

For many years prior to the adoption of said ordinance, the property to the east of said former right of way has been improved and used for commercial, residential or multiple family residences [R. 236, 237, 306-307; Ex. 3]. South of petitioners' property in the contiguous City of Hermosa Beach residences have been constructed and maintained for more than thirty years on property located with respect to the ocean, similarly to petitioners' property [R. 151]. No evidence of damage from the ocean was shown to have occurred to said residences in Hermosa Beach. The two pictures appearing as a frontispiece of the petition show the location of said residences in Hermosa Beach with relation to petitioners' property [Exs. 2, 18, 54, 55].

Said Section 10 clearly deprives petitioners of substantial rights in their property without due process of law in violation of the Fourteenth Amendment.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393;

Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613, 621;

Seattle Trust Co. v. Roberge, 278 U. S. 116, 121;

Eaton v. Sweeny, 257 N. Y. 176, 177 N. E. 412, 414;

Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587, 591;

Householder v. Town of Grand Island, 114 N. Y. S. 2d 852, 855;

Scholl v. Borough of Yeadon, 148 Pa. Super. 601, 26 A. 2d 135, 137.

As was stated in the case of *Seattle Trust Co. v. Roberge, supra,* 278 U. S. 116, 121, the right of the owner of land "to devote its land to any legitimate use is properly within the protection of the Constitution."

The Court of Appeals of New York very aptly stated in *Arverne Bay Const. Co. v. Thatcher, supra,* 278 N. Y. 222, 15 N. E. 2d 587, 589:

> "Legislative power of the state is, however, not plenary but is limited by the Constitution of the United States and by the Constitution of the state. It may not take private property without compensation ever for a public purpose and to advance the general welfare."

This court in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U. S. 393, 413, referring to the right of the govern-

ment to diminish the values incident to property and the implied limitation in this regard, said:

> "But obviously the implied limitation must have its limit, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." (260 U. S. 413.)

In the case at bar the limitation of use placed upon petitioners' property is of such a magnitude that it may be exercised by respondent City only by purchase or eminent domain and the payment of compensation therefore. Otherwise, petitioners' property has been taken without due process of law in violation of the Fourteenth Amendment.

POINT 2.

Section 10 of Said Ordinance Cannot Be Justified Under the Police Power.

The trial court found that reasonable minds might differ as to the safety of residences constructed on pilings on petitioners' property and that such residences might create police problems by reason of possible uses of the areas underneath such residences for immoral purposes [Fdg. II, R. 37].

The trial court concluded and adjudged that Section 10 of the zoning ordinance was enacted

> "for the promotion of public morals, public safety and general welfare of said city * * *" [Con. V, R. 41; Judgment 5, R. 43].

The trial court's judgment was affirmed by the State Supreme Court.

We believe there is no substantial support in the evidence for these findings.

It is well settled that:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611." (Taft, C. J., in *Truax v. Corrigan, supra*, 257 U. S. 312, 324-325.)

We will now demonstrate not only that the findings referred to are "without substantial support" but also that neither the evidence nor the findings support the conclusions or the judgment.

A. Public Safety of Residences Constructed on Pilings on Petitioners' Property.

The evidence is overwhelming to the effect that residences could be safely constructed on petitioners' property. An expert witness called by petitioners (his qualifications were conceded by respondent City [R. 157-158]),

testified that the construction of residences on petitioners' property would be "feasible and practicable" [R. 202] and "would be perfectly safe" [R. 222]. Respondent City offered no testimony to the contrary.

Respondent City conceded that its Building Code required that residences constructed on petitioners' property must be constructed on pilings, although the zoning ordinance prohibited such residences [R. 272-273].

Respondent offered testimony that in time of heavy storm with a high tide, waves had been seen to break at approximately the wheel marks on Exhibit 1 (Frontispiece) and, at several locations on petitioners' property the water came up to the westerly edge of the electric railway right of way [R. 267-268, 297, 298]. The uncontradicted testimony of petitioners' expert was that houses constructed on pilings on petitioners' property as required by respondent City's building code [R. 273-274] would be unaffected by such storms and that since the beach would be simply gouged out and quickly restored by ocean forces, the houses would stand perfectly safe [R. 222].

Said expert witness, in the course of his direct examination, used a schematic drawing to illustrate the approximate location where residences could be constructed on petitioners' property. Said drawing was introduced in evidence as Exhibit 62. On cross-examination said expert was asked this question:

> "Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62?" [R. 231]

and he replied:

> "Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible." [R. 231.][1]

Even a cursory examination of the testimony of said witness clearly shows that in said reply he was not referring to the safety of houses constructed on pilings but only with respect to the details thereof. There is no other evidence in the record as to whether reasonable minds might differ as to the safety of houses constructed on piling on petitioners' property other than the statement of the trial judge after viewing the premises upon stipulation of the parties. The trial judge admitted he was not an expert [R. 329], but concluded:

> "* * * unless these houses were protected on the seaward side by an adequate sea wall, [they] would be subject to a constant hazard of destruction by the sea." [R. 321.]

And further concluded that this was a question

> "* * * upon which reasonable minds might differ." [R. 327.]

In 1950 petitioners challenged the validity of said zoning ordinance as it applied to their property and applied for a change of zone from Beach Recreation to Residence.

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[1]The word "Yes" in said reply was not in the reporter's transcript when first prepared. It was inserted by the trial court on proceedings for correction thereof, which are shown in the Record, pages 343-345.

Petitioners' said application was denied by the Planning Commission of respondent City upon grounds *other than* public safety or public morals [Ex. 49].[2]

The City Council of respondent City approved the findings of said Planning Commission and likewise denied said application [Resolution No. 1551, Ex. 3 to the Comp., R. 21-28; Fdg. VI, R. 38].

At the trial, respondent City endeavored to justify the zoning of petitioners' property for Beach Recreation by the testimony of two witnesses, Clifford G. Petrie, City Manager of respondent, and Tom C. Cook, a zoning expert of the County of Los Angeles. The trial court ruled that both witnesses had qualified as zoning experts. Said witnesses (who were the only zoning experts called by respondent) attempted to justify the zoning of petitioners' property on grounds *other than* public safety or public morals. Petrie, testified that in his opinion petitioners' property was properly zoned for Beach Recreation because:

> "It is ocean frontage, being a natural resource or asset to the community, and those who developed and planned the community strived to take advantage of that asset, that natural resource, by so locating the structural developments sufficiently far enough from the water to permit beach use, to permit a fine view, and to erect a promenade * * *. In my opinion, that was good planning and proper reason for the type of classification used, the community

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[2]The Planning Commission found that the granting of the application

> "* * * would be contrary to public interests, would depreciate the value of surrounding property, is not demanded by any public necessity, convenience or general welfare and [would] be contrary to good zoning practice" [Ex. 49, p. 2, lines 8-11]

taking advantage of its natural resource, natural asset, to the best of its ability." [R. 290.]

Cook, the county zoning expert, the author of Section 10 and the originator of the Beach Recreational Zone concept [R. 252-253] testified in substance that he considered that petitioners' property was properly classified as beach recreation because it was (a) "eminently suited for it," (b) "was being so used," (c) "recreation beaches are a common feature in beach cities," (d) the cost of building "small homes" would necessarily be high, (e) residential development of petitioners' property would destroy certain values which the "properties very close to the ocean front had long enjoyed," and (f) would give the owner *"the right to derive an income from it"* [R. 306-307].

Such testimony not only shows that said Section 10 has no real, substantial relation to public safety or public morals but also shows there was no real or valid basis for classifying petitioners' property as "Beach Recreation." And in so doing it denies to petitioners the equal protection clause of the Fourteenth Amendment.

B. Construction of Residences on Pilings on Petitioners' Property Would Not Affect Public Morals.

Only one witness, Henry G. Sights, the chief of police of respondent, testified on the question of the relation between said Section 10 and public morals. Over the objections of petitioners [R. 296] he was permitted to express the opinion that the construction of houses on pilings would cause,

> "a police problem * * * with juveniles, sex perverts; * * *." [R. 296-297.]

Sights admitted on cross-examination that he was not familiar with houses on pilings except in Santa Monica and through that district and *was not familiar with the police problems there* [R. 301]. It clearly appears that said Section 10 denied to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Every improvement or cover on private property in respondent City might possibly be used for immoral purposes. If said Section 10 is sustained on the ground of public morals it clearly applies one rule to residences on petitioners' property and another to residences, buildings and other structures elsewhere in respondent City.

This Court, quoting from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, said in *Dobbins v. Los Angeles*, 195 U. S. 223, 237:

> "'The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Sinnot v. Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Ry. v. Haber*, 169 U. S. 613, 626.'"

C. The Police Power Is Subordinate to Constitutional Limitations.

This court has stated that the exercise of the police power,

> "must be exercised within a limited ambit and is subordinate to Constitution limitations * * *. Under it there is no unrestricted authority to accomplish whatever the public may presently desire." (*Panhandle Eastern Pipeline Co. v. State Highway Commission,* 229 U. S. 612, 622.)

And the police power:

> "has its limits and must stop when it encounters the prohibitions of the Constitution." (*Eubank v. Richmond,* 226 U. S. 137, 142.)

This court has further stated that if the means employed by a city in exercising the police power,

> "have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of the rights injuriously affected by such illegal action." (*C. B. & Q. Ry. v. Drainage Commissioner,* 200 U. S. 561, 593.)

We submit there is no substantial support in the evidence for the conclusion of the court that the legislative body of respondent City adopted said section for the promotion of public safety, public morals and general welfare, but on the contrary the evidence shows that said Section 10 has no real, substantial relation to public safety, public morals or general welfare.

POINT 3.

The Evidence Shows That the Motives of Respondent City in Enacting Said Zoning Ordinance Were Wrongful. The Holding of the Supreme Court of California That Such Motives Were Immaterial Is Erroneous and Conflicts With the Rulings of This Court.

As pointed out in the Summary Statement of the Case, petitioners' second cause of action challenged the validity of Section 10 of the zoning ordinance for violating the guarantees of the Fourteenth Amendment because it was enacted pursuant to a scheme or plan designed and intended:

1. To keep petitioners' property unimproved so that it could be used by the public as a beach recreational area [R. 18].

2. To depreciate the value of petitioners' property so that a governmental agency could acquire the property by eminent domain proceedings for park purposes at the lowest possible amount of money [R. 18].

The evidence clearly shows that respondent City in enacting said ordinance did so pursuant to a wrongful motive. There was no evidence to the contrary.

The evidence shows, in brief, the following:

1. Respondent City claimed from 1924 to 1938 that petitioners' property had been dedicated to a public use (*City of Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653).

2. In March, 1938, after the decision in the *Cortelyou* case holding that there had been no such dedication, the

City Council adopted a resolution requesting the County and the State to acquire petitioners' property for a public beach, and that petitioners' property "should be acquired by the public for the continued use as a public beach and particularly more at a time when no buildings or structures of any kind have been erected thereon" [Ex. 20].

3. In July, 1938, the mayor and the city attorney of respondent City informed petitioners that the City desired to acquire their property for a public beach and they didn't want petitioners "to sell it or to improve it because to do so would increase its value and they would like to get it within their means if they could" [R. 100].

4. In January, 1939, the City Council directed the city attorney to request petitioners to submit a basis for acquisition of their property [Exs. 22 and 23].

5. In July, 1939, the City Council of respondent City directed the city attorney to communicate with the Governor of the State in an effort to secure assistance in acquiring petitioners' property and, pursuant to such direction, the city attorney, in his communication to the Governor, informed him that petitioners proposed to sell their property and stated "if this is done the cost of acquisition would undoubtedly be materially increased as the property at the present time is not improved" [Ex. 26].

6. In June, 1940, petitioners informed the City Council they were "arranging to sell such portions of their property as could be sold this summer" [Ex. 33].

7. In July, 1940, petitioners sought to enclose their property with a smooth wire fence [Ex. 36; R. 131] which was subsequently so badly damaged by the public

it had to be removed [R. 322]. This fact was made known to the City Council [Ex. 37].[3]

8. In August, 1940, the city clerk was directed by the City Council to answer a letter to it from a resident of respondent City inquiring as to why the property in question was not a public beach and referred to the fence attempted to be constructed by petitioners [Exs. 39 and 40]. The city clerk, pursuant to such direction, answered said inquiry and stated in part:

> "The City Council desires to convey to you and all others interested in this city *that everything possible is being done to whip this thing into the right order of things which means when this matter is finally settled it will be in the hands of the State Park and Playground Department for the use of the public without end*" [Ex. 40].

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[3]Although this exhibit was marked only for identification, the Supreme Court of California assumed that it was in evidence (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 896). Said Exhibit 37 reads as follows:

"July 30, 1940.

City Council of Manhattan Beach
Manhattan Beach
California

Gentlemen:

I am building a fence on my property along the ocean front extending each side of Center Street at Manhattan Beach. Mobs have already destroyed part of my property consisting of fencing materials and threatened to inflict further damage.

I demand that you protect my property from damage and you are notified that I expect to hold the City of Manhattan Beach liable for all damage that I may suffer.

Very truly yours,

ELB EJT
CC Clyde Woodworth
City Attorney, Manhattan Beach"

(This letter was signed by Petitioner Neil S. McCarthy [R. 111, 131].)

9. In June, 1941, the City Council adopted the zoning ordinance in question [Ex. 1 to Comp.; R. 20A-20C].

The trial court considered the motives of respondent City in enacting said ordinance immaterial [R. 118] but, nevertheless, found against petitioners on each of the contentions alleged [Fdg. VII, R. 38-39]. We submit that the findings of the trial court that the motives of the City Council were not wrongful have no support in the evidence.

The Supreme Court of California also concluded that the motives of the legislative body in enacting said zoning ordinance were immaterial (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 893) [R. 379].

The courts have clearly held that a zoning ordinance enacted for the purpose of depressing the value of certain property in order to enable the public authorities to obtain that property by condemnation at a reduced price is unconstitutional and void.

Grand River Dam Authority v. Grand-Hydro, 200 Okla. 157, 201 P. 2d 225, aff'd 335 U. S. 359;

State ex rel. Tingley v. Gurda, 209 Wisc. 63, 243 N. W. 317;

Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N. W. 2d 195;

Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10;

State v. The Cincinnati Gas, Light & Coke Company, 18 Ohio St. 262, 301-302.

In *Dobbins v. Los Angeles, supra,* 195 U. S. 223, this Court in reversing a judgment of the Supreme Court of California which had held valid an ordinance zoning cer-

tain property against the erection of a gas plant, held that:

> "* * * where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts *may consider and give weight to such purpose in considering the validity of the ordinance.*" (195 U. S. 240.)

After citing the case of *Yick Wo v. Hopkins, supra,* 118 U. S. 356, this Court asked a rhetorical question suggesting a negative answer, namely, whether it could be successfully maintained that

> "the council could arbitrarily, and *with a view of compelling the sale of the works to the municipality* or a rival company fix the return at a price below the cost of gas to the producer and at such a rate as to be ruinous to the business?" (195 U. S. 240.)

The case at bar gives rise to an analogous question which requires a negative answer: May respondent City of Manhattan Beach arbitrarily limit the use of petitioners' property and the structures that may be erected thereon, for the purpose of depreciating the value of petitioners' property and enabling it to be acquired in condemnation proceedings at an unreasonably low price?

In *State v. Cincinnati Gas-Light & Coke Co., supra,* 18 Ohio St. 262, the Supreme Court of Ohio declared:

> "Both public and private rights are to be protected, and for that purpose we must recognize the fact that a municipal as well as a private corporation can do wrong." (18 Ohio St. 302.)

This case has been cited with approval and followed by this Court in *Yick Wo v. Hopkins, supra,* 118 U. S.

356, 371 (reversing 68 Cal. 294), and *Dobbins v. City of Los Angeles, supra,* 195 U. S. 223, 240 (reversing 139 Cal. 179).

We submit that the evidence establishes beyond question that the motives of the legislative body of respondent City in enacting said Section 10 were wrongful and that Section 10 is oppressive and discriminates against petitioners. Under such circumstances, the trial court should have considered and given weight to such wrongful motives in determining the validity of said zoning ordinance.

CONCLUSION.

The trial court and the Supreme Court of California did not heed the warning of this Court in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U. S. 393, 416:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (260 U. S. 416.)

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated: May 13, 1954.

Respectfully submitted,

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